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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS H. BROWN AND DEBRA BROWN,
Appellants,
vs.
RICHARD BAILEY AND SARAH BAILEY, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF ALABAMA

JURISDICTIONAL STATEMENT

L. DREW REDDEN
(Counsel of Record)
DOUGLAS H. SCOFIELD
REDDEN, MILLS & CLARK
940 First Alabama Bank Bldg.
Birmingham, Alabama 35203
(205) 322-0457
Counsel for Appellants

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

I. Whether Section 12-15-1(10)j of the *Code of Alabama* (1975), which defines a dependent child as one ". . . who is without proper parental care and control necessary for his well-being . . .", is unconstitutionally vague and overbroad.

II. Whether natural and adoptive parents faced with loss of the custody of their children pursuant to state CHINS and/or dependency proceedings are entitled to the same constitutional protections as parents faced with loss of custody pursuant to state parental termination proceedings, to-wit: proof of current parental unfitness, application of the least drastic alternative to custodial transfer, and deference to parental wishes.

III. Whether the Alabama statutory scheme, which distinguishes between the rights of natural and adoptive parents faced with loss of custody pursuant to state CHINS and/or dependency proceedings and parents faced with loss of custody pursuant to State custody and/or termination proceeding is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IV. Whether Section 12-15-71 of the *Code of Alabama* (1975), which fails to differentiate between lesser and greater deprivations of parental custodial rights and permits a transfer of legal custody from a natural parent to a non-parent without a finding of unfitness, is violative of the Fifth and Fourteenth Amendments to the Constitution of the United States.

V. Whether the Fifth and Fourteenth Amendments to the Constitution of the United States require a juvenile

court, making a disposition pursuant to a state CHINS and/or dependency statute, to set forth in its order specific findings of fact and conclusions of law.

VI. Whether the natural and adoptive parents' procedural due process rights were violated by the juvenile court's order, transferring custody of their minor son to unrelated parties pursuant to a finding of dependency that was not alleged.

LIST OF PARTIES

The parties to this proceeding in the Juvenile Court of Jefferson County, Alabama, were as follows: Tom and Debra Brown, Petitioners/Appellants; Richard and Sarah Bailey, Intervenors/Appellees; Joseph C. Brown, a minor, Appellee.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
LIST OF PARTIES II
TABLE OF CONTENTS III
TABLE OF AUTHORITIES VI
OPINIONS BELOW 2
JURISDICTION 3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3
STATEMENT OF THE CASE 4
ARGUMENT 12

I. The parents were denied due process of law because the Alabama dependency statute utilized by the trial court to deprive them of the custody of their child is unconstitutionally vague and overbroad 12

II. Natural and adoptive parents faced with loss of custody pursuant to state CHINS and dependency proceedings are entitled to the same constitutional protections as parents faced with loss of custody pursuant to state termination proceedings 14

A. The private interests affected by CHINS and dependency proceedings are substantial 15

1. Parents have a fundamental right to the care, custody and control of their minor children 15

a. The substantiality of the parents' custodial interests is not significantly dimin-

ished by the fact that deprivation of the custodial rights *may* only be temporary 16

b. The substantiality of the parents' custodial interests is not significantly diminished by the fact that the deprivation of the parents' custodial rights are not total 17

c. The substantiality of the parents' custodial interests is not significantly diminished by the fact that the transfer of custody was not the actual focus of the litigation, but merely incidental thereto 18

2. The parents have a substantial interest in preventing the irretrievable breakdown of the family unit 19

B. The risk of error is substantial 20

C. The countervailing governmental interests supporting the use of the challenge procedure are *de minimus* 21

III. The Alabama statutory scheme, which distinguishes between the rights of parents facing loss of custody pursuant to custody and termination proceedings from those facing loss of custody in CHINS and dependency proceedings, is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States 22

IV. Section 12-15-71 of the *Code of Alabama* (1975) is unconstitutional, in that it fails to differentiate between lesser and greater deprivations of the parents' custodial rights and permits a transfer of legal custody upon a finding of CHINS and/or dependency without a finding of current parental unfitness 23

V. The trial court's order violated Appellants' due process rights because it contained no factual findings or legal conclusions to justify the trial court's custody change 26

VI. The parents were denied procedural due process when custody was changed based on a holding of dependency that was not even alleged 27

CONCLUSION 28

CERTIFICATE OF SERVICE 28

APPENDIX—

A. Opinion of the Alabama Court of Civil Appeals A1

B. Order denying rehearing A12

C. Order denying certiorari A14

D. Notice of appeal to the Supreme Court of the United States A15

E. Order of the Juvenile Court of Jefferson County, Alabama A17

F. *Ala. Code* § 12-15-71 (1975) A20

TABLE OF AUTHORITIES

Cases

Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976) 12, 13, 25, 27

Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277 (Ct. App. 1976) 26

Ex Parte McLendon, 455 So. 2d 863 (Ala. 1985) 17

Ex Parte Terry, 494 So. 2d 628 (Ala. 1986) 22

Grayned v. City of Rockford, 408 U.S. 104 (1972) 12, 25

In re Gault, 387 U.S. 1 (1967) 19, 26, 27

Mathews v. Eldridge, 424 U.S. 319 (1976) 15, 20, 21

May v. Anderson, 345 U.S. 528 (1953) 16

Meyer v. Nebraska, 262 U.S. 390 (1923) 16

Prince v. Massachusetts, 321 U.S. 158 (1944) 16

Quilloin v. Walcott, 434 U.S. 246 (1978) 14

Santosky v. Kramer, 455 U.S. 745 (1982) 16, 19, 20

Stanley v. Illinois, 405 U.S. 645 (1972) 15, 16, 17, 21, 23, 25

Constitutional Provisions

Constitution of the United States, Amendment V 2, 3, 20, 22, 23, 26

Constitution of the United States, Amendment XIV 1, 2, 3, 20, 22, 23, 26

Statutes

Alabama Code § 12-15-1(4)b (1975) 4, 12, 25

Alabama Code § 12-15-1(10)j (1975) 1, 3, 12

Alabama Code § 12-15-71 (1975) 2, 4, 11, 23, 24, 25

No. _

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANONYMOUS,
Appellants,
vs.
ANONYMOUS,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS OF ALABAMA

JURISDICTIONAL STATEMENT

TO THE SUPREME COURT OF THE UNITED STATES:

Appellants, Tom and Debra Brown, appeal from the final judgment of the Court of Civil Appeals of Alabama dated November 12, 1986, holding as follows:

(a) That *Alabama Code* § 12-15-1(10)j is not unconstitutionally vague and overbroad;

(b) That the due process and equal protection clauses of the Fourteenth Amendment do not require a court to make a finding of parental unfitness prior to transferring

custody of a dependent and/or CHINS child from a parent to a non-parent;

(c) That the due process clauses of the Fifth and Fourteenth Amendments do not require a court, making a disposition pursuant to a finding of dependency or CHINS, to apply the least restrictive alternative short of a custodial transfer, or to give the parents' wishes regarding placement deference;

(d) That *Alabama Code* § 12-15-71 (1975), which fails to differentiate between lesser and greater deprivations of parental custodial rights and permits a transfer of legal custody without a finding of parental unfitness, is not violative of the Fifth and Fourteenth Amendments to the Constitution of the United States;

(e) That the due process clauses to the Fifth and Fourteenth Amendments to the Constitution do not require a court to make specific findings of fact and conclusions of law prior to a transfer of custody pursuant to a finding of CHINS or dependency; and,

(f) That the parents in this case were not deprived of due process of law under the Fifth and Fourteenth Amendments to the Constitution when custody of their child was transferred to an unrelated third party pursuant to a finding of dependency that was not alleged.

OPINIONS BELOW

The opinion of the Court of Civil Appeals of Alabama, which appears as Appendix A hereto, is not yet reported.

The order of the Juvenile Court of Jefferson County, Alabama, entered on January 13, 1986, is also unreported and appears as Appendix E hereto.

JURISDICTION

The judgment of the Court of Civil Appeals affirming the juvenile court's order was entered November 12, 1986. A motion for rehearing was filed on November 26, 1986, and denied on December 23, 1986.

A petition for writ of certiorari, which was filed in the Supreme Court of Alabama on January 6, 1987, was denied March 27, 1987.

This appeal is being docketed within ninety (90) days from the final judgment denying certiorari entered below (see Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment, United States Constitution

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Fourteenth Amendment, United States Constitution

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Alabama Code § 12-15-1(10)j (1975)

(10) DEPENDENT CHILD. A CHILD:

• • •

j. Who is physically, mentally or emotionally abused by his parents, guardian or other custodian or who is with-

out proper parental care or control necessary for his well-being because of the faults or habits of his parents, guardian or other custodian or their neglect or refusal, when able to do so, to provide them;

* * *

Alabama Code § 12-15-1(4)(b) (1975)

(4) CHILD IN NEED OF SUPERVISION. A CHILD WHO:

* * *

b. Disobeys the reasonable and lawful demands of his parents, guardian or other custodian and is beyond their control.

Alabama Code § 12-15-71 (1975)

(See Appendix F).

STATEMENT OF THE CASE

On or about July 14, 1984, Appellants' (hereinafter referred to as Parents) son, Joe, ran away from home and began living with Richard and Sara Bailey, Intervenors in this case. After numerous unsuccessful attempts to persuade Joe to return home, the parents, on December 2, 1985, filed a runaway petition in the Family Court for Jefferson County, Alabama. The Parents' petition alleged that Joe was a child in need of supervision (CHINS), in that he "disobeyed the reasonable and lawful demands of his parents . . . and was beyond their control." The parents' petition did not assert that their son was dependent and, in fact, this option was specifically not designated in the complaint.

On December 5, 1985, the parents' petition was referred to a family court referee for an informal hearing,

at which time Joe was found to be CHINS. It was ordered at that time that he would remain in shelter care and, that any visitation between Joe, the Intervenors, and/or his grandparents should only occur under staff supervision.

On December 18, 1985, Sara and Richard Bailey filed a motion to intervene, offering to make their home available in the event that the court deemed such a disposition appropriate. The Baileys' motion to intervene contained no allegations of dependency.

On December 20, 1985, the court conducted a hearing on the parents' CHINS petition. In addition to the facts set forth in the court's opinion (see Appendix A), the following relevant facts were presented at the hearing. With regard to the altercation that facilitated Joe's departure, both the father and mother testified that the father did not approach Joe in a threatening fashion and that Joe instigated the altercation. (R. 534-36; 602-03; 677). The father testified he only used enough force to extricate himself from Joe and then restrained him. (*Id.*). Joe gave three different versions of the story. In the first version he indicated that he pushed his father. (C.R. 19). In the second version he indicated that his father came at him like he was going to hit him. (R. 75). He also claimed his father swung at him and, he guessed he blocked it. *Id.* He then stated that his father put him in a headlock and started to hit him in the face. (R. 77). In his third version he admitted that it was on his mind that he was going to beat his father. (R. 271). In addition to the above incident, Joe testified that his father had "knocked him down" when he was nine years old, and had hit him in the face when he was 15 years old, after he ran over a pipe in the yard with

a lawn mower. (R. 264). These three alleged incidents constituted Joe's only testimony of any physical disciplining of him by his father. Regarding the incident where the father hit Joe in the face, Joe admitted that his father apologized to him later. (R. 339).

There was also some testimony regarding the presence of drugs in the parents' household. The father admitted that he had grown (approximately 12 years ago) and smoked marijuana in the past, but had not smoked any marijuana for four or five years. (R. 539-586). Joe testified that he observed his parents smoking marijuana on one occasion in the past. Joe also testified that on one occasion he saw a prescription bottle of quaaludes in his parents' refrigerator. (R. 341-344). It was undisputed that these quaaludes belonged to a friend's wife, who was visiting at the time. (R. 343). Joe, himself, admitted that he had not seen any drugs in his parents' house since late 1983 or early 1984, the year prior to his parents' divorce, reconciliation and family counseling with Dr. Wendorf. (R. 370).

With regard to the evidence of past marital discord between the adoptive mother and father (see Appendix A), Joe testified that his parents often fought and became physically violent. (R. 265). Joe admitted, however, that his parents' relationship was much more tranquil after their divorce and reconciliation. (R. 356). In fact, there was no testimony or evidence of any disputes between the Parents from the time of the reconciliation in December of 1984 through the time of Joe's leaving in July 1985, or thereafter. (R. 330). The evidence also revealed that at the time of the reconciliation the parents talked to Joe and the other children and committed that they would be staying together permanently and would in-

volve a family counselor. (R. 617). In fact, starting in December 1984, the parents did counsel with Dr. Wendorf. (R. 11 et seq., R. 509).

The testimony revealed that on December 25, 1985, after Joe claimed for the first time that his father had used excessive force, an abuse report was filed with DPS by Family Counselor Dr. Wendorf. (R. 52, 56-57). Apart from the fact that the report was filed, there was no other evidence offered by the Appellee to support a claim of physical abuse. Appellees offered no expert medical testimony or testimony from any of the other children to substantiate any claim of abuse. The Appellees relied solely on the fact that a report was filed.

On the positive side, Joe admittted that his parents had been supportive of him in school and loved him. (R. 266, 268). The testimony revealed that the children, including Joe, maintained A's and B's in school and were involved in numerous extracurricular activities. (R. 502). Joe admitted that his parents helped sponsor his special band trip when he was in high school (R. 296), and went to see him in concert (*Id.*). In addition, Joe was encouraged to participate in family outings and vacations.

Prior to his running away, Joe was offered first choice on private living quarters in the parents' home, which consisted of his own bedroom, bathroom and walk-in closet. (R. 256). On his 16th birthday, he received a 1974 Grand Prix automobile as a combined Christmas and birthday present. (R. 565-66). There is no evidence that the parents ever failed to meet Joe's physical needs.

The parents' love for Joe was reflected in Dr. Wendorf's written report which stated: "He [Tom Brown] is quite committed to staying in touch with Joe whom he loves, provide competent, trustworthy supervision of Joe

for him to have a strong base to grow up and away from, and work toward getting Joe back into the home, so he can eventually leave in an acceptable, not rebellious, rejecting fashion." (R. 42). In fact, when the family went to counseling with Dr. Wendorf, Joe brought up no problems that he was having with his parents. (R. 269). Joe also testified that he loved his parents (R. 268), and that at one point his only reason for not returning home was because he didn't feel like he should be punished. (R. 547).

At the hearing several alternatives to the transfer of custody to the Intervenors were offered to the Court. The parents' first choice was for their son to return home; alternatively, pursuant to the family court referee's suggestion, the parents agreed that their son would reside with his aunt and uncle temporarily. (R. 621-22). The family counselor also testified that Joe should be placed temporarily with his aunt and uncle. (R. 39-40).

Although in her report the probation officer recommended that Joe be placed with his aunt and uncle (see R. 19), during the hearing she recommended that he reside at the Salvation Army's Boys Lodge for a period of 90 days. (R. 645).

Notwithstanding the various alternatives that were offered for the court's consideration, the evidence was totally undisputed that there was absolutely no hope of reconciliation between Joe and his parents if Joe was allowed to remain in the custody of the Baileys. (R. 39-40; 561; 552-553; 557; 596; 611-12; 614-15; 662; 620).

Following the hearing, the court, on January 13, 1986, awarded temporary custody of Joe to the Baileys. In its final order the court indicated that the child was in need of supervision pursuant to *Ala. Code,* § 12-14-1(4)b and dependent pursuant to *Ala. Code* § 12-15-1(10)j Neither

the parents, nor the Intervenors, nor any other party to this case filed any paper or pleading alleging that Joe was dependent.[1] In fact, the court during the course of its hearing specifically stated that this was not a dependency case. The court's opinion made no finding of unfitness and did not reserve any visitation or other rights in the parents. The order did require the parents to pay Intervenors $350.00 per month child support, and ordered the parents and the child to resume counseling. (See Appendix E).

On December 27, 1986, the parents appealed the juvenile court's order to the Court of Civil Appeals of Alabama. On appeal parents argued that the juvenile court's order in effect terminated their parental rights to the care, custody and control of their child. Both *procedural* and *substantive* due process issues were raised under the Fifth and Fourteenth Amendments to the Constitution. Several other constitutional issues were raised, including that the Alabama dependency statute, upon which the transfer of custody was based, was unconstitutionally vague and overbroad; that the trial court violated their right to procedural due process in that its order contained no factual findings or legal conclusions to justify its change of custody; that the trial court violated the right to due process by not giving the parents' wishes deference in the placement of the child's physical custody; and that the court failed to apply less drastic alternatives to the transfer of custody.

On November 12, the Alabama Court of Civil Appeals rejected the parents' constitutional claims and affirmed

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1. Intervenors did file a custody petition in a separate case that alleged dependency as a basis for seeking custody. That case was ultimately dismissed and was never consolidated with the instant case.

the decision of the juvenile court. In its opinion, the court stated:

> Because this case is not one involving the termination of parental rights, the parents' contention on appeal that such termination violated their due process and other constitutional rights is without merit. Similarly, their contention that the juvenile court's judgment must be reversed because there was not clear and convincing evidence that the parents were unfit is an attempt to apply inappropriate standards to this case.
>
> Whether the parents are unfit or not would be a determination necessary for termination of their parental rights. *See Ala. Code* (1975) Section 26-18-7. Such a determination, however, is not necessary in a case such as this one in which the juvenile court makes a disposition following a finding that the child is dependent, as well as in need of supervision. Moreover, this case is not simply a custody dispute between parents and non-parents. Thus, the parents' reliance on *Ex Parte Terry*, [Ms. June 27, 1986] ..... So. 2d ..... (1986), is misplaced.

Court's opinion at pages 2, 3. All other constitutional claims raised by the parents were summarily rejected by the court.

On November 26, 1986, an application for rehearing was filed in the Alabama Court of Civil Appeals. On rehearing, the parents attempted to persuade the court as to the significance of their constitutional arguments. In short, the parents argued that the standard of current parental unfitness posed by the parents is a constitutionally mandated standard which applies whenever custody is

litigated between a parent and a non-parent, regardless whether there is an actual termination of the parental rights or merely a deprivation of such rights. The parents further argued that the application of this standard is not dependent upon whether the transfer of custody is the actual subject of the litigation or merely incidental to it. The parents also challenged the sufficiency of evidence in that it related merely to past conduct, and not current parental unfitness.

In response to the court's opinion, the Parents also argued that the court, by affording a presumption of parental unfitness to parents faced with loss of custody by way of termination proceedings, and not to those faced with loss of custody by way of neglect or dependency proceedings, provided a convenient way for individuals seeking custody of one's children to circumvent the presumption of parental custody. The parents also challenged the constitutionality of the Alabama CHINS statute, *Ala. Code* § 12-15-71 (1975) on the grounds that it permits the transfer of custody without a finding of parental unfitness and without applying the least restrictive alternative short of a transfer of custody.

On December 23, 1986, the Court of Civil Appeals entered an order overruling Defendant's application for rehearing. In its order the court failed to address the additional issues raised by the parents on rehearing. (See Appendix B).

A petition for writ of certiorari, which was filed in the Supreme Court of Alabama on January 6, 1987, was denied on March 27, 1987. (See Appendix C). Notice of appeal to this Court was filed in the Court of Civil Appeals of Alabama on June 17, 1987. (See Appendix D).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE PARENTS WERE DENIED DUE PROCESS OF LAW BECAUSE THE ALABAMA DEPENDENCY STATUTE UTILIZED BY THE TRIAL COURT TO DEPRIVE THEM OF THE CUSTODY OF THEIR CHILD IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

Following an adjudicational and dispositional hearing the court found Appellants' child to be in need of supervision, pursuant to § 12-15-1(4)b *Code of Alabama* (1975) and, also, to be a dependent child, in need of care and protection of the court pursuant to § 12-15-1(10)j *Code of Alabama* (1975). Pursuant to the court's finding of dependency, the care, custody and control of their son was placed with the Intervenors. (See Appendix E). On appeal, Appellants questioned the constitutionality of the Alabama dependency statute. Because dependency had not been an issue before the court, the parents were unable to challenge the constitutionality of this statute prior to their appeal.

In *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972), this Court recognized that vague and overbroad statutes carry with them three dangers: the absence of fair warning regarding the nature of the conduct that is prohibited; the risk that the statute will be applied in an arbitrary and discriminatory fashion; and, the risk that the statute may inhibit the free exercise of constitutionally protected rights. In *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd,* 545 F.2d 1137 (8th Cir. 1976), the court, applying the standards set forth by this Court in *Grayned,* found the Iowa termi-

nation statute unconstitutionally vague and overbroad. Specifically, that court indicated, "the standards of 'necessary parental care and protection' Section 232.41(2)(b) and of '[parental] conduct . . . detrimental to the physical or mental health or morals of the child,' Section 232.41(2)(d), are susceptible to multifarious interpretations which prevent the ordinary person from knowing what is and is not prohibited." 406 F. Supp. at 18. The court also indicated that the same language afforded state officials so much discretion in their interpretation and application that arbitrary and discriminatory parental terminations were inevitable. *Id.* As stated by that court:

> Under Iowa's current scheme, state officials may subjectively determine, on an *ad hoc* basis, what parental conduct is "necessary" and what parental conduct is "detrimental". Termination of the parent-child relationship in any given case may thus turn upon which state officials are involved in the case, rather than upon explicit standards reflecting legislative intent.

406 F. Supp. at 18.

While the decision in *Alsager* was affirmed on other grounds, the Eighth Circuit Court of Appeals nevertheless determined that the questions involving the constitutionality of the Iowa statutes were "serious ones". *Alsager v. District Court,* 545 F.2d 1137, 1138 (8th Cir. 1976).

The parents in this case contend that the use of the terms, "parental care and control necessary for his well-being"; "physical, mental, and emotional abuse"; and, "neglect" in the Alabama statutory scheme are equally repugnant to the constitution and, thus, require reversal of this case. Under the Alabama statutory scheme the trial court is in a position to determine for itself what is "proper parental care and control necessary for a child's

well-being." This is precisely what the court did in this case. Such actions on the part of the courts deprive Alabama parents of the necessary notice as to what conduct is and is not prohibited by the statute. As will be argued, *infra*, it also deprives a parent who has lost custody from determining what he must do to regain custody once it is lost.

II. NATURAL AND ADOPTIVE PARENTS FACED WITH LOSS OF CUSTODY PURSUANT TO STATE CHINS AND DEPENDENCY PROCEEDINGS ARE ENTITLED TO THE SAME CONSTITUTIONAL PROTECTIONS AS PARENTS FACED WITH LOSS OF CUSTODY PURSUANT TO STATE TERMINATION PROCEEDINGS.

The question of whether natural parents faced with the loss of the custody of their children pursuant to a CHINS or dependency proceeding are entitled to the same constitutional protections as those faced with termination of their custodial rights is a novel and substantial one. This Court has previously noted that it is unlikely that a natural parent's rights could be terminated without proof of unfitness,[2] but has never addressed the

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2. In *Quilloin v. Walcott*, 434 U.S. 246 (1978) this Court stated:

> We have little doubt that the due process clause would be offended '[I]f a state were to attempt the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and the sole reason that to do so was thought to be in the child's best interest.' *Id.* at 255 quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment). This position was reaffirmed in *Santosky v. Kramer*, 455 U.S. 745 (1982), wherein this Court stated: "The family court judge in the present case expressly refused to terminate petitioner's parental rights on a 'non-statutory, non-fault basis.' App. 22-29. Nor is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness." *Id.* at 760 n.10.

issue of whether the same standard needs to be applied to deprivations of custody short of termination. The Court of Civil Appeals of Alabama, apparently focusing on the differences between the extent of the constitutional deprivations involved in CHINS and dependency proceedings, as opposed to termination proceedings, concluded that a lesser standard could be applied. In fact, it would appear that the Alabama court concluded that no process was due at all. (See Appendix A).

The propriety of the Alabama court's conclusion and, the question of what process is due, requires application of the three-pronged test set forth by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). There, it was determined that such questions turn on the balancing of three distinct factors: the private interests affected by the proceeding; the risk of error created by the State's chosen procedure (or lack of procedure); and the countervailing governmental interests supporting the challenged procedure. *Mathews*, 424 U.S. at 335. Applying the three-pronged test of *Mathews*, it is apparent that there exists no rational basis in law or fact, for applying a lesser standard to a transfer of custody pursuant to a CHINS or dependency proceeding than a termination proceeding.

A. The Private Interests Affected by CHINS and Dependency Proceedings Are Substantial.

1. Parents have a fundamental right to the care, custody and control of their minor children.

This Court has long held that the parents have a fundamental right to the companionship, care, custody and management of their minor children which is substantial and cognizable. *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972). The aegis of due process extends to the

parent as an individual and to the family as a unit, *Meyer v. Nebraska,* 262 U.S. 390 (1923), and resides first in the natural or adoptive parents. *Prince v. Massachusetts,* 321 U.S. 158, 168 (1944). Such rights have been deemed "essential". *Meyer, supra,* and have been described as more precious than property rights. *May v. Anderson,* 345 U.S. 528, 533 (1953). So strong is the parents' interest that it "does not evaporate simply because they [the parents] have not been model parents or have lost temporary custody to the state." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). Nor, Appellants contend, do their interests evaporate simply because the deprivation of their rights is partial, rather than total, or incidental to the proceeding rather than the actual focus of it.

a. The substantiality of the parents' custodial interests is not significantly diminshed by the fact deprivation of the custodial rights may only be temporary.

In its opinion the court indicated:

> Cases such as this are never *res judicata.* The juvenile court has left the door open for the parents and the child to improve their relationship. We would hope that the parents and the child take advantage of the opportunity given them to do so.

(See Appendix A). The above quoted language appears to be an attempt on the part of the court to justify its decision not to afford the parents the same rights as those parents facing termination on the grounds that their loss of custody may be only temporary. Such an approach, however, has been previously rejected by this Court. In *Stanley v. Illinois,* 405 U.S. 645 (1972), this Court rejected the State's argument that the court need not consider the validity of a natural parent's constitu-

tional claims because the Illinois statutory scheme provided a method by which one could regain custody of one's child. In this regard the Court stated, "a wrong cannot be done if it can be undone." *Id.* at 647.

Moreover, the substantiality of the parental interest here, while only temporary, is increased by the fact that under Alabama law, parents, having lost custody, are required to prove a material change in circumstances which materially promotes the best interest and welfare of the child before custody can be regained. *Ex Parte McLendon*, 455 So. 2d 863, 865 (Ala. 1985). Such proof would require the natural parents to produce evidence sufficiently great to overcome the presumption that a change in custody back to the natural parents would be inherently disruptive to the child. *Id.* at 866. Such a burden is extremely heavy, especially, as here, where a court is permitted to base its original custody decision on past parental conduct rather than current parental unfitness.

b. The substantiality of the parents' custodial interest is not significantly diminished by the fact that the deprivation of the parents' custodial right are not total.

In its opinion, the court appeared to make a distinction between CHINS proceedings and termination proceedings on the basis that the deprivation of the parental right is not total. In this regard the court stated:

> At the outset we note that the parents have attempted to characterize this case as one in which their parental rights have been terminated because custody was awarded to the Baileys. Such a characterization is simply incorrect. The juvenile court's judgment of January 13, 1986, makes it quite clear

> that the parents' parental rights have not been terminated because it orders the parents and the child to resume counseling. No mention is made of any termination of the parents' rights.

(See Appendix A). Such a comment on the part of the court is evidence of an attempt to decide the constitutional issues raised by the parents in a vacuum. Counseling or no counseling the fact remains that the juvenile court specifically transferred "care, custody and control" of the parents' minor son to the Baileys. (See Appendix E). These are all the rights that the constitution says that the parents have. As it stands, the parents have no visitation rights, no right to determine with whom or where their son lives, or how he is cared for. The fact that a court orders that parental duties shall resume is not a significant reason for denying parents faced with loss of the custody of their child, important constitutional protections.

c. The substantiality of the parents' custodial interests is not significantly diminished by the fact that the transfer of custody was not the actual focus of the litigation, but merely incidental thereto.

Throughout its opinion, the court consistently attempted to justify the lower court's transfer of custody on the basis that this was not a custody proceeding or termination proceeding, but merely a transfer of custody pursuant to a CHINS proceeding. The court continually stressed that upon a finding of CHINS and dependency the court was duly authorized to transfer custody. Such an approach neglects the fact that the parents have, in fact, lost custody of their child. The parents find no comfort in the fact that the transfer was merely incidental to the proceeding.

The court's position is also inconsistent with this Court's decision in *In re Gault*, 387 U.S. 1 (1967), wherein this Court stated:

> Due process of law requires notice of the sort we have described—that is notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and *his parents' right to his custody are at stake* without giving them timely notice, in advance of the hearing, of the specific issues they must meet.

387 U.S. at 33-34 (emphasis added). In *Gault* this Court did not distinguish between the child's rights and the parents' rights on the basis that the transfer of custody there would be merely incidental to a finding of delinquency. Due to the magnitude of the interests at stake, any distinctions made by a court on that basis would clearly be misplaced.

2. The parents have a substantial interest in preventing the irretrievable breakdown of the family unit.

A second interest at stake in all CHINS and dependency proceedings is the vital interest the parents have in preventing the irretrievable breakdown of their family unit. This interest, which was recognized by this Court in *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), is, in many ways, what this case is all about. The testimony was undisputed that following their son's departure, the parents unsuccessfully attempted to get their son to return home. Such attempts involved the aid of a counselor who helped the parents draft a list of conditions for their son's return. While disputed testimony was offered with

regard to with whom Appellants' son should reside, two things were clear from the evidence. The parents did not wish their son to reside with the Intervenors, and such an order by the court would result in an irretrievable breakdown of the family unit. It is the result of this vital interest that the parents argued on appeal that the court was constitutionally required to give deference to their wishes regarding their son's residence and, also, that the court was constitutionally required to consider less drastic alternatives to the transfer of legal custody. The fact that the court may have perceived the relationship to have been already irretrievably broken, is insufficient to justify the court's violation of the parents' constitutional right to determine how, and with whom, their son would be raised.

B. The Risk of Error Is Substantial.

In *Santosky v. Kramer, supra,* this Court held that the due process clause of the Fifth and Fourteenth Amendments of the Constitution required proof by clear and convincing evidence at a parental termination proceeding. Applying the three-pronged test in *Mathews v. Eldridge, supra,* the Court concluded that such a standard is necessary to prevent the risk of error when the parents' fundamental interests are at stake. While the parents in this case contend that the evidence was neither clear nor convincing, they do concede that the Alabama court, at least in form, applied the clear and convincing standard of *Santosky*. What increases the risk of error under the Alabama statutory scheme, however, is not the degree of proof that the court required but, rather, the fact that the statutes upon which the findings of CHINS and dependency were based are vague and overbroad. As previously argued, a vague and overbroad statute does not place the

parents, nor the court, on sufficient notice as to what conduct is prohibited by the statute. For this reason, while the evidence may be "clear and convincing," one must ask, clear and convincing of what? The parents contend that, where as here, the CHINS and dependency statutes are vague and overbroad, the clear and convincing standard as applied by the Alabama courts is insufficient to protect parents from the risk of an erroneous transfer of custody. This is especially apparent when one reviews the evidence upon which the Court of Civil Appeals relied in affirming the juvenile court's decision.

C. The Countervailing Governmental Interests Supporting the Use of the Challenge Procedure Are De Minimus.

The parents concede that the State has an interest in protecting the health, safety and welfare of minor children. *Stanley v. Illinois,* 405 U.S. 645 (1972). As recognized by this Court in *Stanley,* however, this interest is *de minimus* where the parents are fit. Here, the parents were ready, willing and able to resume full custody of their child. The record is completely void of any evidence to support a finding that the parents were unfit. Nor is there any evidence that any State interest would be remotely advanced by a transfer of custody to the Baileys. The only interest advanced was that of the son, who wished to remain at the Baileys.

Applying the three-pronged test of *Mathews,* it cannot be said that the State's interest in transferring custody from a fit parent to an unrelated third party is sufficiently compelling to warrant the abrogation of a parent's fundamental rights to the care, custody and control of his children. Nor is the State's interest sufficient to undermine the vital parental interest in preventing the irretrievable

breakdown of the family unit. For these reasons, the parents respectfully request this Court to hear them on the issue of whether the Fifth and Fourteenth Amendments of the Constitution of the United States of America require proof of current parental unfitness prior to a change of custody incidental to a CHINS or dependency proceeding. They also request to be heard on the issue of whether a court making a disposition pursuant to a CHINS or dependency proceeding must apply the least drastic alternatives available in order to protect the vital interest the parents have in preventing the irretrievable breakdown of their family unit.

III. THE ALABAMA STATUTORY SCHEME, WHICH DISTINGUISHES BETWEEN THE RIGHTS OF PARENTS FACING LOSS OF CUSTODY PURSUANT TO CUSTODY AND TERMINATION PROCEEDINGS FROM THOSE FACING LOSS OF CUSTODY IN CHINS AND DEPENDENCY PROCEEDINGS, IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In advancing its argument regarding the application of the standard of parental unfitness to CHINS and dependency proceedings, the parents relied heavily on the Supreme Court of Alabama's opinion in *Ex Parte Terry*, 494 So. 2d 628 (Ala. 1986). In *Terry* the court held that a natural parent, who had not been awarded custody by a prior divorce decree, but who had not been found unfit, has a primary right to custody in a subsequent proceeding, as against all third parties. *Id.*

The Court of Civil Appeals rejected the application of *Terry* to the facts in this case on the ground that this

was not simply a custody proceeding between parents and non-parents, but rather, a transfer of custody pursuant to a finding of CHINS and dependency. (See Appendix A). On rehearing, the parents attacked the court's holding, arguing that the court's holding provides a convenient way for third parties, who attempt to gain custody of another's child, to circumvent the natural and adoptive parents' primary right to custody. Based on the court's reasoning, the party seeking custody would merely need to file a CHINS or dependency petition, rather than a custody petition, and then offer themselves as willing parties available to take custody in the event the court finds the child CHINS or dependent. This is precisely what the Intervenors did in this case. While the parents concede that on appeal they did not expressly couch their argument in terms of equal protection, they contend that this argument, which is similar to the argument made by the natural father in *Stanley v. Illinois, supra,* has been sufficiently preserved for appeal.

IV. SECTION 12-15-71 OF THE CODE OF ALABAMA (1975) IS UNCONSTITUTIONAL, IN THAT IT FAILS TO DIFFERENTIATE BETWEEN LESSER AND GREATER DEPRIVATIONS OF THE PARENTS' CUSTODIAL RIGHTS AND PERMITS A TRANSFER OF LEGAL CUSTODY UPON A FINDING OF CHINS AND/OR DEPENDENCY WITHOUT A FINDING OF CURRENT PARENTAL UNFITNESS.

In its brief to the Court of Civil Appeals of Alabama, the Parents argued that the Fifth and Fourteenth Amendments to the Constitution of the United States require that a standard of current parental unfitness be applied

to all transfers of custody pursuant to findings of CHINS and/or dependency. The parents also argued that the court was constitutionally required to apply the least drastic alternative available to it short of transfer of custody. The Alabama court rejected both of the parents' arguments, citing the fact that neither is required by statute. In response to the court's opinion, the parents, on rehearing, advanced the argument that if the statute does not require what the constitution requires, the statute, is unconstitutional.

Dispositions of cases involving dependent children, delinquent children, and children in need of supervision are governed by *Ala. Code* § 12-15-71 (1975) (see Appendix F). Among the dispositions available to the court following a finding of CHINS and/or dependency are to permit the child to return home subject to any limitations the court may prescribe (*Ala. Code* § 12-15-71(a)(1)); to place the child in the protective supervision of the Department of Human Resources (§ 12-15-71(a)(2)); or to transfer the legal custody of the child to one of several designated parties (§ 12-15-71(a)(10)(3)). The only restriction on the court's authority is found in provisions (b) and (c) of the statute, which provide that unless a child is adjudicated both delinquent and CHINS or delinquent and dependent, the court has no authority to order him confined to a detention facility. (See Appendix F). The statute in no way differentiates between the application of the least restrictive alternative (returning the child home) and the most restrictive alternative (transfer legal custody). Such is left totally to the discretion of the court. The parents argue that in light of their strong interest in maintaining family integrity and the State's limited interest in removing custody from a fit parent, the Alabama

statutory scheme, by not requiring the court to apply the least restrictive disposition short of a transfer of custody, is violative of their rights to due process and equal protection of the law as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States.

The parents also contend that *Ala. Code* § 12-15-71 violates the right to due process of law in that it permits the deprivation of parental custody without a finding of parental unfitness. The parents specifically attack *Ala. Code* § 12-15-71(c), which relates to CHINS dispositions. This statute is unconstitutional in that it permits a transfer of legal custody from a parent to a non-parent without a specific finding of any fault on the part of the parent. Under Alabama law, a child in need of supervision is defined as, "one who disobeys the reasonable and lawful demands of his parents and is beyond their control." *Ala. Code* § 12-15-1(4)b. To find a child CHINS, it is not necessary to prove any fault on the part of the parents. To allow transfer of custody without a requirement of parental fault clearly violates the parents' right to the care, custody and control of their children. For the above stated reasons, *Alabama Code* § 12-15-71 is unconstitutional on its face, and as applied. *Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Alsager v. District Court of Polk City, Iowa,* 406 F. Supp. 10 (S.D. Iowa 1975). The parents, by raising their constitutional objections on appeal, presented the Alabama courts with an opportunity to construe their statutes in a manner consistent with constitutional demands. Because the courts of Alabama chose not to do so, the Alabama statutory scheme is due to be struck down. *Id.*

V. THE TRIAL COURT'S ORDER VIOLATED APPELLANTS' DUE PROCESS RIGHTS BECAUSE IT CONTAINED NO FACTUAL FINDINGS OR LEGAL CONCLUSIONS TO JUSTIFY THE TRIAL COURT'S CUSTODY CHANGE.

As previously noted, the rights to family integrity and to maintain the custody and control of one's children are basic, fundamental rights protected by the United States Constitution, Amendments Five and Fourteen. In the instant case, the trial court denied the parents their basic and fundamental rights by failing to specifically set forth in its order the reason for its transfer of custody. The court merely cited the Alabama dependency statute. The parents contend that such failure to include specific findings of fact violated their basic constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Fundamental fairness requires that the parents be afforded reasonable notice of the basic deprivation of their custody. *In re Gault,* 387 U.S. 1 (1967). Without appropriate findings of fact, parents are left to speculate on the reasons for the deprivation of custody. This has the effect of denying them a reasonable opportunity to correct their shortcomings, as perceived by the trial court, so that they might some day regain custody. It also may hamper their ability to gain effective appellate review. Prior to any change of custody, the trial court should be constitutionally required to make specific judicial findings to support any legal conclusions. See, e.g., *Bennett v. Jeffreys,* 40 N.Y.2d 543, 356 N.E.2d 277 (Ct. App. 1976). The failure of the trial court to do so in the case at bar violated the parents' due process and other constitutional rights.

VI. THE PARENTS WERE DENIED PROCEDURAL DUE PROCESS WHEN CUSTODY WAS CHANGED BASED ON A HOLDING OF DEPENDENCY THAT WAS NOT EVEN ALLEGED.

As indicated in the statement of the case, the record in this case is void of any claims or allegations of dependency by the Intervenors or anyone else. In fact, the trial court explicitly acknowledged that the case was not a dependency case. Yet the court, following a dispositional hearing on Appellants' CHINS petition, changed custody based on a holding of dependency. Such a change of custody, based on a claim that was neither pleaded in legal terms, nor alleged in factual terms, violated the parents' procedural due process rights.

It is axiomatic that the requirements of both substantive and procedural due process apply in cases involving attempts to deprive parents of custody of their children. See *In re Gault,* 387 U.S. 1 (1967). In *Gault,* this Court held that in delinquency proceedings, due process requires that written notice be given to the parents as soon as practicable, informing them of the specific issues they might meet in order to adequately prepare a defense. Other courts have held that the notice required must contain both the alleged factual basis for the claim and a statement of the legal standards. *Alsager v. District Court of Polk County, Iowa, supra.* In the case at bar, the parents were not even afforded notice of legal standards, much less any fundamental basis for the trial court's action.

The parents in this case were under the reasonable impression that the court was proceeding on their CHINS petition which, ironically, was filed for the purpose of causing their child to be returned home or to be placed

with individuals of their own choice, until such time as their differences could be resolved. Due to the lack of notice the parents had no reason to expect that their child would be found dependent and his custody transferred to a third party. The parents were also deprived of an opportunity to adequately defend the then non-existent dependency claims. Based on the fact that the parents were afforded no notice of either the legal or factual basis for a claim of dependency, the fundamental right to due process was abridged.

CONCLUSION

For the reasons stated herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

L. DREW REDDEN
(Counsel of Record)
DOUGLAS H. SCOFIELD
940 First Alabama Bank Bldg.
Birmingham, Alabama 35203
(205) 322-0457

I certify that I have served three copies of the foregoing Jurisdictional Statement on all parties requiring to have been served, by mailing the same to the Honorable Wynell Brooks, c/o Family Court of Jefferson County, 120 - 2nd Court, No., Birmingham, Alabama 35211, and Honorable Evans Whaley, 90 Bagby Drive, Birmingham, Alabama 35209, properly addressed and with sufficient first class postage prepaid, this the 25th day of June 1987.

L. DREW REDDEN
Of Counsel for Appellants

APPENDIX

APPENDIX A

(Filed November 12, 1986)

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS
OCTOBER TERM 1986-87

Civ. 5261 and Civ. 5441

Anonymous

v.

Anonymous

Appeal from Jefferson Juvenile Court

HOLMES, JUDGE

This is a child dependency and custody case.

Following *ore tenus* proceedings, the Juvenile Court of Jefferson County determined that the sixteen-year-old male child was a child in need of supervision (CHINS) and a dependent child. The juvenile court, following a dispositional hearing, placed custody of the child with Richard and Sarah Bailey, who are the parents of a friend of the child and who had intervened in the case.

The parents, through able counsel, appeal, alleging numerous grounds for reversal. We affirm in part and reverse and remand in part.

The parents initiated this case by filing a CHINS petition in December 1985. Approximately five months earlier, the child had run away from home following a violent altercation with his father. Thereafter, he had resided with the Baileys. The parents had apparently attempted to persuade him to return home, and, when he did not do so, they filed the CHINS petition.

I

At the outset we note that the parents have attempted to characterize this case as one in which their parental rights have been terminated because custody was awarded to the Baileys. Such a characterization is simply incorrect. The juvenile court's judgment of January 13, 1986, makes it quite clear that the parents' parental rights have not been terminated because it orders the parents and the child to resume counseling. No mention is made of any termination of the parents' rights.

Because this case is not one involving the termination of parental rights, the parents' contention on appeal that such termination violated their due process and other constitutional rights is without merit. Similarly, their contention that the juvenile court's judgment must be reversed because there was not clear and convincing evidence that the parents were unfit is an attempt to apply inappropriate standards to this case.

Whether the parents are unfit or not would be a determination necessary for termination of their parental rights. *See* Ala. Code (1975), § 26-18-7. Such a determination, however, is not necessary in a case such as this

one in which the juvenile court makes a disposition following a finding that the child is dependent, as well as in need of supervision. Moreover, this case is not simply a custody dispute between parents and nonparents. Thus, the parents' reliance upon *Ex parte Terry,* [Ms. June 27, 1986] ..... So. 2d ..... (Ala. 1986), is misplaced.

The primary issue before this court is whether there is clear and convincing evidence to support the determination by the juvenile court that the child is in need of supervision and that he is dependent. Ala. Code (1975), § 12-15-65(e). Our review of the record shows that there is such evidence.

The juvenile court found that the child was in need of supervision under Ala. Code (1975), § 12-15-1(4)(b), i.e., that he had disobeyed the reasonable and lawful demands of his parents and was beyond their control. We think the evidence amply supports this determination.

Following the altercation with his father, the child "ran away" to the Baileys and refused to return home to live, as the parents demanded. Under such circumstances we find no error in the juvenile court's CHINS determination.

We think the evidence also clearly supports the juvenile court's determination that the child was dependent under Ala. Code (1975), § 12-15-1(10)(j). Under this statute a child is dependent if he "is physically, mentally or emotionally abused by his parents . . . or . . . is without proper parental care and control necessary for his well-being because of the faults or habits of his parents . . . ."

The record reveals that the child and his parents have encountered some of the same problems that many teenagers and their parents encounter when the teenagers seek

to widen the scope of their freedom and the parents attempt to enforce discipline. In addition, however, there was evidence that the father had hit the child and his younger brother in the face. The father has also made statements to the child threatening physical punishment. Dr. Donald Wendorf, a clinical psychologist, who had counseled with both the child and his parents, testified that some of these "episodes . . . could be described as emotionally abusive." Dr. Wendorf stated that the child had expressed his "concern about the physical confrontations with his father."

We note that the father has married and divorced three different women for a total of five marriages and four divorces over the course of the child's life. There was evidence that the father and his current wife have experienced marital difficulties and have engaged in physically violent arguments while the children were in the home. They were divorced for approximately two months in the fall of 1984.

There was also evidence that the father does not enjoy a good relationship with his own parents and has sought to cut off the child's relationship with them. Dr. Wendorf opined that the conflict between the child and the father is related to problems that the father experienced with his own father and feelings of vulnerabiilty and rejection.

There is other evidence to support the juvenile court's determination, but we deem it unnecessary to the resolution of this appeal to detail such evidence.

We think that the evidence clearly and convincingly supports the juvenile court's determination of dependency. We disagree with the parents' contention that the dependency determination is inherently inconsistent with its CHINS determination. The fact that the child refused his parents' demand that he return home after "running

away" supports the conclusion that he is in need of supervision. That conclusion does not conflict with the finding that the child is also dependent due to his parents' physical, mental, or emotional abuse. Moreover, the finding that the child required supervision supports a determination of dependency based upon the totality of the circumstances presented to the juvenile court. *See* Ala. Code (1975), § 12-15-1(10)(m); *Carter v. Jefferson County Department of Pensions & Security,* [Ms. August 20, 1986] ..... So. 2d ..... (Ala. Civ. App. 1986).

Having determined by clear and convincing evidence that the child was dependent and in need of supervision, the juvenile court was then authorized to make a disposition of the case. Ala. Code (1975), § 12-15-65(e). Its disposition was to place custody of the child with the Baileys. In so doing, the parents contend that the juvenile court abused its discretion. We disagree.

Disposition in cases such as the present one is governed by Ala. Code (1975), § 12-15-71(a), for a dependent child and § 12-15-71(c) for a CHINS. In either case, the juvenile court has several options open to it. One option is to transfer custody to a "relative or other individual who, after study [by the Department of Pensions and Security or by probation services] is found by the court to be qualified to receive and care for the child." Ala. Code (1975), § 12-15-71(a)(3)c. and (c)(3)d.

The record reflects that a probation officer employed by the Jefferson County Family, or Juvenile, Court investigated the Baileys' home and prepared a report. The officer concluded that the home met all requirements for a foster home and that it was an "ideal" setting. Given this evidence, the juvenile court did not abuse its statutory discretion in placing custody of the child with the Baileys.

The parents contend, however, that the juvenile court failed to consider less drastic alternatives than placing custody with the Baileys. The requirement that the juvenile court consider less drastic alternatives is applicable in cases involving the termination of parental rights. *See, e.g., Buckhalter v. Department of Pensions & Security,* 484 So. 2d 1119 (Ala. Civ. App. 1986). As already noted, this is not a termination of parental rights case, but a disposition following a determination of CHINS and dependency, for which the juvenile court is not required to consider less drastic alternatives.

II

The parents also raise several constitutional issues relating to the dependency determination.

The parents contend, first, that their procedural due process rights were violated because custody was changed based upon a dependency determination when dependency had not been alleged. They argue that they did not have adequate notice that dependency was an issue in the case. We disagree.

The record reflects that on December 20, 1985, the Baileys filed, in addition to a motion to intervene, a petition seeking custody of the child on grounds of his dependency. The parents were thus fully informed that this issue had been injected into the case, and there could be no denial of their due process rights on grounds of inadequate notice.

The parents also contend that they were denied due process because the order of the juvenile court contained no factual findings or legal conclusions and, thus, did not sufficiently inform them of the basis for the determination of dependency.

While it might be preferable for a juvenile court to set forth detailed findings and conclusions in each case, the CHINS and dependency statutes do not require it to do so. *See* Ala. Code (1975), §§ 12-15-65 and 12-15-71. Moreover, in our opinion, the order of the juvenile court, which cited to the specific statutory provisions upon which the court relied, fully apprised the parents of the bases for both the CHINS and the dependency determinations.

The parents' further contention that the dependency statute itself is impermissibly vague and overbroad and that its utilization by the juvenile court therefore denied them due process is simply without merit and is not supported by the cases relied upon by the parents in brief.

III

The parents also attack on appeal the jurisdiction of the juvenile court to alter the custody of the child. They contend that the juvenile court was without jurisdiction because the Jefferson County Circuit Court had already obtained continuing jurisdiction over the child's custody when it divorced the parents in October 1984.

This case is not a custody dispute between the parents. It is, as already discussed, a disposition following a determination of CHINS and dependency. As such, the juvenile court had original jurisdiction pursuant to Ala. Code (1975), § 12-15-30(a)(1). *See Carter*, ... So. 2d .....

We note, moreover, that the parents invoked the jurisdiction of the juvenile court in the first instance by filing the CHINS petition. Under such circumstances, we find their attack on the jurisdiction of that court to be without merit.

IV

The parents further contend that the juvenile court erred in granting the Baileys' motion to intervene because the motion did not conform to the requirements of Rule 24(c), Alabama Rules of Civil Procedure. That rule requires that the motion state the grounds for intervention and that it be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

The parents claim that the Baileys' motion sets forth no claim or defense and that it is thus insufficient under Rule 24. The parents ignore, however, the Baileys' petition for custody, which was apparently filed the same day as the motion to intervene and which does set forth definite contentions with regard to why the Baileys sought custody. The record reflects that the petition, as well as the motion to intervene, was before the juvenile court and was considered by it when it granted the Baileys' motion to intervene.

Moreover, the record does not reflect that the parents challenged the sufficiency of the motion to intervene under Rule 24 in the juvenile court. We thus find that their contention that the juvenile court erred in granting the motion is without merit.

V

The parents' final contentions on appeal concern that part of the judgment of the juvenile court which required them to pay the Baileys $350 per month child support and an attorney's fee of $3,500 to the child's guardian *ad litem.*

Ala. Code (1975), § 12-15-9, authorizes the juvenile court to order the parents to pay to the persons to whom custody of the child is given a "reasonable sum" for the child's support and treatment. It is well established,

moreover, that the award of child support is a matter generally within the discretion of the trial court, which will not be reversed except for an abuse of that discretion. *Lewis v. Lewis,* 494 So. 2d 105 (Ala. Civ. App. 1986); *Brannon v. Brannon,* 477 So. 2d 445 (Ala. Civ. App. 1985).

In determining the amount of child support, the trial court should consider the needs of the child and the parents' ability to pay. *Lewis,* 494 So. 2d 105; *Brannon,* 477 So. 2d at 447.

Applying these standards in the present case, we find that the juvenile court was well within its discretion in ordering the parents to pay $350 per month for the support of the child.

The child testified as to his needs and expenses, including expenses for school supplies and lunch, expenses for personal articles such as soap and shampoo, and gas expenses. The fact that the child did not place a dollar amount on each of these expenses does not diminish his testimony as to his need for money to cover such expenses. On the other hand, the parents' ability to pay was clearly established. Both parents work and have a substantial income. Under such circumstances, we think the support award was well within the bounds of reasonableness.

The juvenile court awarded an attorney's fee in this case pursuant to Ala. Code (1975), § 12-15-11, which grants to juvenile courts the authority to require financially able parents in a case such as this one to pay court costs and attorney fees.

In addition to the general grant of authority given by § 12-15-11, however, the juvenile court is also governed by Ala. Code (1975), § 15-12-21, which places specific guidelines and limits on the award of attorney fees and the payment of expenses in a case such as this one. Section

15-12-21(d) places a $1,000 ceiling on the amount of the fee that can be awarded to any one attorney in the case.

In awarding a fee of $3,500 to the child's guardian *ad litem,* the juvenile court ignored the specific $1,000 cap which § 15-12-21(d) places on the amount which may be awarded for such a fee. This part of the judgment of the juvenile court is, therefore, due to be reversed and remanded for the juvenile court to award an attorney's fee in accordance with both § 12-15-11 and § 15-12-21(d).

VI

In conclusion, we would simply note again that, while heartrendering, this case does not in any way terminate the parental rights of the parents. Based upon the evidence before it, the juvenile court, after finding the child to be both in need of supervision and dependent, simply concluded that placing the child in the custody of his parents was not at this time the best alternative.

Cases such as this one are never *res judicata.* The juvenile court has left the door open for the parents and the child to improve their relationship. We would hope that the parents and the child would take advantage of the opportunity given them to do so.

This case is affirmed in part and reversed and remanded in part for entry of an order in accordance with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Wright, P.J., and Bradley, J., concur.

I, John H. Wilkerson, Jr., Clerk of the Court of Civ. Appeals of Alabama, do hereby certify that the foregoing

is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said court. Witness my hand this 12th day of Nov., 1986.

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals
of Alabama

APPENDIX B

OFFICE OF
CLERK OF THE COURT OF CIVIL APPEALS
STATE OF ALABAMA
MONTGOMERY

Re: CIV. 5261 and 5441 December 23, 1986

Anonymous Appellant vs. Anonymous Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Court of Civil Appeals:

..... Court Reporter granted additional time to file reporter's transcript to and including

..... Clerk/Register granted additional time to file clerk's record/record on appeal to and including

..... Appell..... granted 7 additional days to file brief(s) to and including

..... Appellant(s) granted 7 additional days to file reply brief(s) to and including

..... Record on Appeal filed on this date.

..... Appendix Filed on this date.

..... Submitted on Briefs

xxx Application for rehearing overruled. No opinion written on rehearing.

..... Permission to file amicus curiae briefs granted

..... Rules suspended

..... Transferred to the Supreme Court for lack of jurisdiction. A/N

.....

/s/ John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals
of Alabama

MAILING ADDRESS:

2600 East South Boulevard, Room 250
Montgomery, Alabama 36116

APPENDIX C

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

March 27, 1987

86-463

EX PARTE: ANONYMOUS

PETITION FOR WRIT OF CERTIORARI

(Re: Anonymous v. Anonymous)

CIV 5261/5441

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

PER CURIAM – TORBERT, CJ., MADDOX, ALMON, BEATTY & HOUSTON, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 27 day of March 1987.

/s/ Robert G. Esdale
Clerk, Supreme Court
of Alabama

APPENDIX D

IN THE COURT OF CIVIL APPEALS OF ALABAMA

CASE NOS. Civ 5261; Civ 5541

ANONYMOUS,
Appellants,

v.

ANONYMOUS,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above named Appellants in this case Tom and Debra Brown hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Civil Appeals of the State of Alabama, affirming the order of the Juvenile Court of Jefferson County, Alabama, entered in this action on November 12, 1986. Certiorari was denied by the Alabama Supreme Court on March 27, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ L. Drew Redden
L. Drew Redden
Counsel for the Appellant
Redden, Mills & Clark
940 First Alabama Bank Bldg.
Birmingham, Alabama 35203
Phone: 205/322-0457

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice of Appeal upon the Honorable Evans Whaley and the Honorable Wynell Brooks by mailing a copy of the same to each of them in the United States mail, properly addressed and with sufficient postage prepaid. I have also served a copy of this notice on the Clerk for the Supreme Court of Alabama whose currently in possession of the record.

Done this the 16th day of June 1987.

/s/ L. Drew Redden DHS
L. Drew Redden, Of Counsel

APPENDIX E

CASE ACTION SUMMARY

Continuation

State of Alabama
Unified Judicial System

Case Number
JU 85 52998

Style: Brown, Joseph

Date	Actions, Judgments, Case Notes
1/13/86	This cause came on to be heard on December 20, 1985, and on January 6 through 10, 1986, on petition filed by Thomas H. Brown, the father, and on Motion to Intervene filed by Richard & Sarah Bailey, and Present before the court were the child, Joseph Brown, represented by Wynell Brooks; the father and mother, represented by Roger Appell; Richard & Sarah Bailey, represented by Evans Whaley; and Glenette Green, Probation Officer; and The Court having heard oral argument in open court on motion to intervene of Richard and Sarah Bailey, hereby grants same and Richard and Sarah Bailey are made parties in this cause, and The motion to dismiss by counsel for the child is hereby denied and motion to amend petition by petitioner is hereby granted. Petition is hereby amended to change the name of the child's guardian, having custody, control and supervision to Thomas H. Brown from that of Mary Dobbs.

Regarding the allegations of the petition on its merits, the court heard the sworn testimony in open court of Dr. Don Wendorf and Joseph Brown, the child, and having considered same and having reviewed the evidence presented, finds that the child in this cause is a child in need of supervision, being 16 years of age and in need of the care and supervision of this court pursuant to §12-15-1(4)(b), Code of Alabama, 1975.

Following the hearing on the merits of the petition, the court conducted a dispositional hearing and heard the sworn testimony in open court of Jack Farr, Leigh Fleck, Joseph Brown, Thomas McAlilly, Nancy McKee, Richard Bailey, Robert McKee, Richard Bailey, Jr., Sarah Bailey, Thomas H. Brown, and Deborah K. Brown, and

This court having heard same and having reviewed the evidence presented, finds that the child is this cause is also a dependent child, in need of the care and protection of this court, pursuant to §12-15-1(10)(j), Code of Alabama, 1975, and

It is hereby ORDERED, ADJUDGED AND DECREED that the care, custody and control of Joseph Brown be placed with Richard and Sarah Bailey, intervenors herein. The father, mother and child are hereby ordered to resume counseling as directed by their counselor with direction to Richard and Sarah Bailey to participate in same if so requested by the counselor.

The Jefferson County Department of Pensions & Security is hereby directed to investigate the home of Thomas and Debra Brown as to the well-being of the three other children who reside therein and report to this court in writing as to same; and

A hearing on motion of counsel for child for costs of child support and other care and for attorneys fees is hereby set on March 13, 1986, at 9:00 AM.

Motion by counsel for father and mother for attorneys fees and costs is hereby denied.

Case is set for further hearing on March 13, 1986, at 9:00 AM.

/s/ S. H. Ross
Sandra H. Ross, Judge

1/16/86 Due to clerical error, the date of entry of the preceding order in this cause was omitted. On this court's own motion, that order is amended to reflect that it was entered on January 13, 1986.

/s/ S. H. Ross
Sandra H. Ross, Judge

APPENDIX F

§ 12-15-71. Disposition of dependent children, delinquent children or children in need of supervision generally.

(a) If a child is found to be dependent, the court may make any of the following orders of disposition to protect the welfare of the child:

(1) Permit the child to remain with his parents, guardian or other custodian, subject to such conditions and limitations as the court may prescribe;

(2) Place the child under protective supervision as herein provided or under the supervision of the department of human resources;

(3) Transfer legal custody to any of the following:

a. The department of human resources; provided, that said department is equipped to care for the child;

b. A local public child-placing agency or private organization or facility willing and able to assume the education, care and maintenance of the child and which is licensed by the department of human resources or otherwise authorized by law to receive and provide care for such child; or

c. A relative or other individual who, after study by the department of human resources, is found by the court to be qualified to receive and care for the child;

(4) In the case of any child 14 years of age or older, where the court finds that the school officials have made a diligent effort to meet the child's educational needs and, after study, the court further finds that the child is not able to benefit appreciably from further schooling, the court may:

a. Excuse the child from further compliance with any legal requirement of compulsory school attendance; and

b. Authorize the child, notwithstanding the provisions of any other law, to be employed in any occupation which is not legally declared hazardous for children under the age of 18;

(5) Make such other order as the court in its discretion shall deem to be for the welfare and best interests of the child;

(6) In appropriate cases, award permanent custody to the department of human resources or to a licensed child-placing agency with termination of parental rights and authorization to place for adoption, without appointing a legal custodian or guardian or guardian of the person, or award temporary custody to the same without appointing a legal custodian or guardian or guardian of the person.

(b) Unless a child found dependent shall also be found to be delinquent, he shall not be committed to or confined in an institution established for the care and rehabilitation of delinquent children or detention facility; provided, however, that nothing in this subsection shall be construed to prohibit the placement of dependent children in any other residential facility as defined in subdivision (21) of section 12-15-1.

(c) If a child is found to be delinquent or in need of supervision, the court may make any of the following orders or dispositions for his supervision, care and rehabilitation:

(1) Permit the child to remain with his parents, guardian or other custodian, subject to such conditions and limitations as the court may prescribe;

(2) Place the child on probation under such conditions and limitations as the court may prescribe;

(3) Transfer legal custody to any of the following:

a. The department of youth services, with or without a commitment order to a specific institution;

b. In the case of a child in need of supervision, the department of youth services or the department of human resources;

c. A local, public or private agency, organization or facility willing and able to assume the education, care and maintenance of the child and which is licensed or otherwise authorized by law to receive and provide care for children;

d. A relative or other individual who, after study by the probation services, is found by the court to be qualified to receive and care for the child;

(4) Any order which is authorized by subdivision (4) of subsection (a) of this section and subject to the requirements thereof; or

(5) Make such other order as the court in its discretion shall deem to be for the welfare and best

interests of the child, including assessment of fines not to exceed $250.00 and such restitution as the court deems appropriate.

(d) No child by virtue of a disposition under this section shall be committed or transferred to a penal institution or other facility used for the execution of sentences of persons convicted of a crime.

(e) No child found to be in need of supervision, unless also found to be delinquent, shall be committed to or placed in an institution or facility established for the care and rehabilitation of delinquent children unless the court finds upon a further hearing that the child is not amenable to treatment or rehabilitation under any prior disposition or unless such child is again alleged to be a child in need of supervision and the court, after hearing, so finds.

(f) When a delinquent child is committable to an institution or agency for the mentally retarded or mentally ill, the court shall proceed as provided in section 12-15-70 rather than committing to an institution or facility for the care and rehabilitation of delinquent children.

(g) Whenever the court vests legal custody in an agency or department, it shall transmit with the order copies of the clinical reports, predisposition study and other information it has pertinent to the care and treatment of the child. (Acts 1975, No. 1205, p. 2334, § 5-131.)

NO. 87-15

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term

Thomas H. Brown and Debra Brown,
Appellants,

vs.

Richard L. Bailey and Sarah Bailey,
Appellee.

On Appeal From the Court of Civil
Appeals of Alabama

REPLY BRIEF BY APPELLEES IN OPPOSITION TO APPELLANTS' JURISDICTIONAL STATEMENT

Annetta Z. Arnold
(Counsel of Record)
H. Evans Whaley
Vincent, Hasty, Arnold &
Whaley, P.C.
90 Bagby Drive, Suite 200
Birmingham, Alabama 35209
(205) 942-7649
Counsel for Appellees-Intervenors
J. Wynell Brooks
Public Defender
120 Second Court North
Birmingham, Alabama 35211
Counsel for Appellee

TABLE OF CONTENTS

NOTE: The following portions of the Appellants' Jurisdictional Statement are not included in Appellees Brief In Opposition pursuant to Supreme Court Rule 34.2 but are included by reference:

Questions Presented

List of Parties

Opinions Below

Jurisdiction

Constitutional Provisions and Statutes Involved

Appendix - A through F

CONTENTS

Table of Contents	I
Table of Authorities	II
Statement of the Case/Facts	1
Argument Summary	22
Argument	23
Conclusion	32
Certificate	33

TABLE OF AUTHORITIES

In Addition to the Cases, Constitutional Provisions, and Statutes listed in Appellants' Jurisdictional Statement, Appellees offer the following cases to the authorities listed:

City of Montgomery v. Robinson, 441 So. 2d 857 (Ala. Civ. App. 1983) 24

Ex Parte Terry, 494 So. 2d 628 (Ala. 1986) 26

Howard v. Pike, 275 So. 2d 645, 270 Ala. 213 (1973) 24

Strickland v. Osborn, 333 So. 2d 582, 584 (Ala. App. 1976) 26

STATEMENT OF THE CASE/FACTS

There are several inaccuracies and omissions in Appellants' statement as well as some additional information that Appellants supply which appears to add testimony that is not in the record. These problems may be due to the fact that the able and distinguished attorneys for the Appellants on appeal were not the trial attorneys in this case at the Family Court level.

Appellees offer the following Statement of the Case and Statement of Facts to give to the Court a complete picture of the complex and unfortunate factual and procedural situation in this case pursuant to Supreme Court Rule 34.2:

STATEMENT OF THE CASE

The Appellants' Statement of the Case is not correct with respect to the lack of pleadings or notice to the parents regard-

ing the Intervenors request for custody and the allegation of the child's dependency.

In addition to the Motion to Intervene filed on December 18, 1985 (C.R. 11) the Baileys filed a separate petition for custody of Joe Brown on December 20, 1985. This petition was erroneously assigned a separate case number, JU-85 53148, and was personally served on the parties during the hearing on December 20, 1985. The Court's record for this case was forwarded from the Family Court clerk's office to the Court of Civil Appeals. Counsel Roger Appell and the parents, Tom and Debra Brown, examined the petition, and the petition was discussed as an integral part of the motion to intervene by the Baileys (R. 4-10). Specific references to the custody petition were also made on R. 7, R. 89, and R. 90.

Another error exists in that the

Appellants also state that the Brown's parental rights have been terminated; however, this is not the case and the termination statutes are not applicable in this action. Custody determinations in CHINS and dependency cases are not always termination of parental rights cases. Termination of parental rights cases place the child with the state or with adoptive parents.

The Trial Court did not terminate the Browns' parental rights. The court's order of January 13, 1986 specifically directed that the entire family resume counseling in an attempt to solve their family problems. The Baileys were awarded custody; however, the Browns have rights and obligations with respect to Joe Brown, just as divorced, non-custodial parents have to their children. There is a clear distinction in Alabama law between custody determinations and the termination of par-

ental rights, and in this case the award of custody to the Baileys did not terminate the Browns' parental rights and obligations. The Browns have the residual parental rights and responsibilities as defined in Alabama Cose 12-15-1(22).

STATEMENT OF FACTS

The "facts" in Appellants' brief appear to be the parents' rationalized view of the unfortunate circumstances that prefaced this action, and must be restated to properly reflect the situation before the Trial Court in Joe Brown's case. A careful reading of the transcript reveals a far different picture of the Browns' family situation and relationship with their son Joe that the one presented in Appellants' statement.

On or about July 13, 1985, Tom Brown disciplined his thirteen-year-old son,

Ben, with a beating (R. 74). The previous day he had slapped his fourteen-year-old son, Jason, in the face (R. 663). On July 15, 1985, he approached his sixteen-year-old son, Joe, with raised fist and began hitting him (R. 75). Tom had his son Joe in a headlock and hit him in the face three times (R. 77). Tom outweighs his oldest son by at least fifty pounds (R. 605).

Joe went to his friends', the Baileys, home, where the Baileys' college-aged daughter saw "all the blood on his shirt, and his face beat up" (R. 434). Dr. Don Wendorf, a licensed psychologist who had been treating Tom and his wife, Debra Brown, for more than a year prior to the court proceedings, filed an abuse report with the Department of Pensions and Security after learning of the July 15th incident (R. 45, 52).

Joe began living with the Baileys on the 15th of July, 1985. The Baileys pro-

vided all of his moral and monetary support until December 2nd (R. 169). Tom Brown knew his son was staying with the Baileys and gave his son permission to stay there (R. 537). Mr. Brown never contacted the Baileys about his son staying there, and he never offered any support during the five months that his son was with them (R. 119). Furthermore, he refused to pay a medical bill that his son sent him (R. 457).

To give a complete picture of the incidents leading to the Trial Court's decision, a history of the Brown family is necessary.

When Tom Brown was a freshman at the University of Alabama, he married his seventeen-year-old girlfriend, Mary Dobbs, who was pregnant (R. 487). Tom's first marriage ended in divorce in 1969 after less than one year (R. 488), and Mary Dobbs was awarded custody of the infant child, Joe. In 1970, Tom Brown took custody of

Joe, and married Mary Lou Hipp (R. 490). Ms. Hipp had a son by a previous marriage, Lonnie, and Tom later adopted Lonnie (R. 490). Two children, Ben and Eric, were born of this marriage to Mary Lou Hipp (R. 569).

Tom and Mary Lou were divorced in 1976, and later in the year, remarried (R. 494-495). However, in 1978 they were again divorced (R. 495). In the 1978 divorce, Mary Lou obtained custody of all four children, including Joe, who was not her child (R. 495). However, Tom Brown later received custody of all four children, including Lonnie, who was not his biological child (R. 496). Later, Lonnie returned to the custody of his natural mother (R. 499-500).

Only a few months passed between Tom's second divorce of Mary Lou and his first marriage to Debra (R. 314). Tom Brown was twenty-eight years of age, and

the October 14th marriage to Debra was his fourth marriage. Their 1978 marriage was at least Debra's third marriage, and she had a son, Jason, by one of her previous husbands (R. 569). Debra also adopted Joe (C.R. 025).

Tom's marriage to Debra has not been a tranquil one. For at least a year and a half prior to the proceedings, Tom and Debra had been receiving treatment from counselors (R. 356). They first received treatment from a female family counselor, and then in December of 1984, with a psychologist, Dr. Don Wendorf (R. 11). Tom and Debra fought often and at times became physically violent (R. 265).

One evening in November 1984, Tom Brown waited up for Debra while the children were in bed. When she came in, Tom started shaking her and pushing her against a wall. At that time, she called for Joe to come in

and help (R. 304). When Joe responded to the call for help, his mother said that Tom had been banging her head into a wall and had ripped her clothes (R. 304).

Another incident occurred in late 1984 when the police went to the Brown home in response to an altercation between Tom and Debra (R. 315). Debra had come to the house one night and found Tom with another woman (R. 351). Tom and Debra had, at this time, been divorced for approximately one month (R. 350). Tom had his son Ben call the police because Debra was beating him up because there was another woman there. The "other woman" stayed the entire night (R. 352), and the children, who ranged in age from seven to fourteen years, were present in the home (R. 590).

When Tom and Debra divorced in 1984, Tom told Joe it was because Debra had been cheating on him with another man (R. 590). While Tom and Debra were divorced and Debra

was not living in the house, Tom stayed out all night on more than one occasion and left the boys, who ranged in age from seven to fourteen years, at home alone (R. 305).

When Tom and Debra remarried in late 1984 or early 1985, it was his fifth marriage, and at least her fourth. Tom was thirty-three years old at the time.

As stated previously, physical confrontations were not only those between Tom and Debra, but included severe physical discipline of the children. Tom's actions toward Joe on July 15, 1985 precipitated an abuse petition being filed with the Alabama Department of Pensions and Security. Dr. Wendorf suspected not only physical abuse, but that Tom was emotionally abusive toward his children as well (R. 45). Tom's actions toward his wife and children may be partially explained, but certainly not excused, by the fact that he was probably physically and emotionally

abused by his own father (R. 44).

Testimony revealed an incident where Ben, immediately after being alone with his father Tom, exited the room with two black eyes and a bloody nose (R. 299). At that time, Tom took Ben from the den, through the house, to the child's bedroom prior to hitting him. Tom's striking of Ben was not an impassioned reaction, but to the contrary, he said he had time to think about what he was doing (R. 594). Debra testified that one day before the discipline incident with Ben, Tom was slapping Jason (R. 663). The children complained to Debra about being hit (R. 665), but she hit the children in the face as well (R. 264, 668).

Tom and Debra also kept controlled substanced in .their home when Joe was living there (R. 305). They kept marijuana in a German beer stein in the den and marijuana seed upstairs in their bedroom (R.

305). There was also pot (marijuana) in ashtrays in the den (R. 306). Tom also rolled marijuana in front of Joe (R. 306, 460) and smoked marijuana in his house with the children there (R. 585). The Browns also acknowledged having Quaaludes in the refrigerator (R. 306, 307). The Quaaludes were explained as belonging to the parents' friend and not to the Browns and that Tom's friend's wife put them there (R. 343). Tom also admitted that he had, in the past, grown marijuana on his father's land (R. 586).

In addition to the evidence about the physical and emotional abuse, as well as the drugs, very revealing testimony was elicited in regard to their son Eric's birthday. Tom testified that Eric's birthday was October 14, 1977 (R. 569). However, Tom and Debra instructed the children to celebrate Eric's birthday on October 1 each year after he was enrolled

in school (R. 573). Tom also testified that either he or Debra enrolled Eric in school (R. 574). However, the child was enrolled pursuant to an altered birth certificate with a birthday of October 1. When Tom was asked: "Wasn't the child enrolled pursuant to the October 1 birthday that was given to the Board of Education," he refused to answer on the grounds that it might tend to incriminate him (R. 574). Tom was asked if he submitted an altered birth certificate to the Board of Education. He again responded by refusing to answer on the grounds that it might incriminate him (R. 573). Tom Brown also pled the Fifth Amendment when asked if he supplied an altered birth certificate to a medical doctor.

The preceding has been an overview of events prior to Joe leaving his father's house. What occurred after he left is just as enlightening.

After being beaten by his father to the extent that he had a lump on his head, was bleeding, had headaches and was sick to his stomach, he moved in with the Baileys on July 15, 1985. Mr. and Mrs. Bailey were out of town when Joe got to their home, but he called them and obtained permission from them to stay (R. 159, 415). After Joe left his house that afternoon, Tom, by his own admission, made no attempt to find his son (R. 581). Within two days, the Homewood police chief located Joe at the home of Richard Bailey, Joe's best friend (R. 542).

Tom Brown gave Joe permission to stay with the Baileys (R. 537). In fact, when Joe went to get his clothes, his father was sitting on the bed next to the child's packed clothes, reading a newspaper (R. 310-311). He did not ask his son to stay (R. 311), and told him not to come back after 6:00 that evening (R. 376).

Tom and Debra had no further contact with Joe until August, when Joe went to Tom's office to see his father regarding a permission slip to play football (R. 431-432). Tom denied the request for Joe to play football. In October, Joe received, at the Baileys' home, a copy of a letter Tom sent refusing to pay a medical bill incurred by Joe (R. 547, 611). There was no personal contact by Tom and Debra with Joe from August until late November.

In November Tom and Debra drew up a list of "conditions of return and continued residence" for Joe's return to their home. The conditions included requirements that Joe completely sever all ties with his paternal grandparents, his girlfriend and the Baileys (C.R. 044). The conditions also required Joe to do chores "cheerfully" and always maintain certain grades. The conditions also required him to:

> Perform all the major weekend chores, such as painting, leaf raking, lawn mowing, house cleaning, washing, waxing and cleaning automobiles, without the assistance of brothers for the same period of time as your absence from home (R. 44).

When these conditions were given to Joe, he had been gone for approximately four months.

Further, when this list was presented to Joe, it had a notation, "This offer expires at 12:01 a.m., November 28, 1985" (C.R. 045), as well as "Understood and agreed to," with a signature line. Joe declined his father's non-negotiable offer.

Tom and Debra's requirement that Joe completely sever his relationship with his girlfriend, Leigh Fleck, seemed extremely harsh. While Joe was living with the Baileys, Tom and Debra went through the things Joe did not take with him. They read many

notes from Leigh to Joe, as well as Joe's diary (R. 555). After going through his things, they discovered Joe and Leigh had been having sexual relations. Tom and Debra testified they were unhappy that their son was having sexual relations. Their attorney grilled Leigh extensively on how many times a day and how many days a week she and Joe had sexual relations.

The Browns' alleged disapproval of the premarital sex seems quite inconsistent with their actions. Tom put prophylactics in Joe's Christmas stocking as early as Christmas of 1984 (R. 595) and told Joe if he got a girl pregnant, "it would not be his (Joe's) responsibility" (R. 361).

Tom and Debra had forbidden Joe to communicate with his brothers. However, Joe did telephone his parents' home in an attempt to talk with Ben. Tom, without Joe's knowledge, listened to their conversation on an extension (R. 562-564). It

was only after Joe attempted to talk with his brothers that the CHINS petition was filed in Family Court (R. 564).

Joe had one face-to-face contact with his father from July to December, and that was the one initiated by Joe at his father's office regarding football (R. 431-432). Joe next saw his parents in the Family Court of Jefferson County pursuant to a runaway petition and pickup order.

Police were sent to the Baileys' home to pick up Joe (R. 484), and Joe was held at the Jefferson County Family Court for two days. A detention hearing was held to decide where Joe would be placed until the hearing (C.R. 005). A number of non-institutional alternatives were offered, including the Baileys' home and the homes of two different clergymen, but Tom and Debra wanted him in an institutional setting; therefore, he was placed in the Salvation Army Youth Emergency Service (hereinafter

"Y.E.S.") (C.R. 005).

Tom and Debra visited Joe, at the request of the counselor at the Y.E.S program, twice while he was there.

Trial was begun on December 20th before the Honorable Sandra Ross. As the trial was not completed prior to the Christmas break, Judge Ross placed the child with the Baileys during the recess to avoid the child having to remain in an institution during the Christmas holidays (R. 150). Tom and Debra strenuously objected and requested that the child remain in the institution over the holidays (R. 152).

Tom and Debra did not contact Joe during the Christmas and New Year holidays (R. 613). He received no calls, no presents, and not even a card from Tom and Debra (R. 613). Meanwhile, Tom and Debra enjoyed a ski vacation in the mountains (R. 613).

Probation Services conducted an in-

vestigation of the Baileys' home and found that it met all "ideal and written requirements for a DYS foster home" (R. 700, C.R. 013).

After approximately forty-three hours of testimony, Judge Ross found Joe to be both a CHINS as well as a dependent child (C.R. 007, 008). She also ordered that the Department of Pensions and Security investigate the home of Tom and Debra Brown as to the well-being of the remaining children in the home (C.R. 008).

There are other inconsistencies between Appellants' "facts" and real life. Tom and Debra Brown, "loving parents," have not complied with the Court's order for continued counseling regarding the problems with Joe (S.R. 136). Tom Brown withdrew over $1,000 from his son's account that was designated for Joe's use for his education, without consulting with Joe or explaining his actions to Joe (S.R.

101). During the period that Joe began seeing Leigh Fleck, with all of the problems delineated by the Browns that came with the relationship, Tom and Debra were in significant marital conflict, and Tom admitted that he was "in emotional turmoil at that time" (R. 600). These inconsistencies were not indicative of the loving and concerned home portrayed by Appellants in their statement.

The record shows that the Browns have the ability to pay for the support of their child. The record shows that the child needs financial support, despite the prior assumption of all support obligations by the Intervenors. The real facts are that no support was provided for Joe Brown by Tom and Debra until after the court's ruling on the support issue. Nothing was offered or paid by Tom and Debra from July through the support hearing for Joe Brown's benefit (S.R. 39).

There are many other conflicting points in the Appellants' version of the facts; however, the record adequately shows that there was emotional and physical abuse of Joe Brown and very inconsistent behavior by Joe's father throughout his life, especially in the period prior to Joe's leaving home in July 1985.

APPELLEES ARGUMENT IN OPPOSITION TO APPELLANTS' REQUEST FOR SUPREME COURT REVIEW OF THIS APPEAL

Appellees contend that the constitutionality questions and challenges raised by the Appellants (Parents) are invalid for the following reasons:

1. The issues of vague and overbroad statutory construction were not made in a timely manner at the trial level.

2. This case was not a termination of parental rights case, but the case was instead a CHINS/dependency case which was decided by the Trial Court under the appro-

priate standards and statutes.

3. There are no special or important reasons present in this case to warrant an attack on the Alabama statutory scheme for dealing with CHINS/DEPENDENT children. The parents instituted this action by petition, invoked the jurisdiction of the Family Court, were given notice of the intervention and the dependency allegations, and tried the case by presenting evidence to the Trial Court; therefore, it is inconsistent for the parents to now claim that they were denied due process of law by the statutes and the court that they chose to use in this family relations case.

SPECIFIC ARGUMENTS

I. THE PARENTS WERE NOT DENIED DUE PROCESS AND THE ALABAMA DEPENDENCY STATUTE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

The parents claim in their statement

that dependency was not before the court; however, the Baileys offered a petition alleging dependency as described above in the Statement of the Case. The parents were not unable to challenge the constitutionality of the statute, they simply did not make a challenge until the appeal process began. There was no adverse constitutional ruling by the Trial Court which could be challenged on constitutional grounds by the parents. The case law supports the Appellees' contention that constitutional questions cannot be considered for the first time on appeal. City of Montgomery v. Robinson, 441 So. 2d 857 (Ala. Civ. App. 1983); Howard v. Pike, 275 So. 2d 645, 270 Ala. 213 (1973).

The cases cited by the Appellants in support of their due process arguments involve termination of parental rights, and this case involved a temporary custody change with a Trial Court order to resume

counseling/contact to perhaps effect a reconciliation; therefore, Appellants reliance on these termination cases is misplaced.

II. THE APPELLANTS AGAIN CONTEND THAT THIS IS A TERMINATION OF PARENTAL RIGHTS CASE; HOWEVER, THIS CASE IS FACTUALLY AND STATUTORILY DISTINGUISHED FROM A TERMINATION CASE.

As the previous courts have noted, this case cannot be characterized as a termination of parental rights case. The standards, burdens, parties, and the statutes involved in termination cases differ from the CHINS and/or dependency cases.

The parents initially and voluntarily filed this action under the jurisdiction of the Family Court. While the Family Court must weigh the substantial private interests of the parents, this trial court must make its decisions based on the best interests of the child. As stated in a

1976 Alabama case, the primary objective of a court in a custody case is to make a determination of the best interests of the child, and this rule of law prevents slavish adherence to the principle that if the natural parent is fit, that parent received custody of the child. Strickland vs. Osborn, 333 So. 2d 582, 584 (Ala. App. 1976). There is no constitutional right for the parents to abuse a child mentally and/or physically, and many factors must be evaluated by the trier of fact under the present Alabama statutes prior to reaching a custody determination.

The Appellees contend that the Alabama laws currently provide adequate constitutional safeguards to allow the lower courts to properly decide custody issues without the necessity of finding parental unfitness when the best interests of the child indicate a need for a temporary change of custody under the facts

before the court. The vital interests of the parents must be tempered by the rights of and the protection of the child.

III. THE ALABAMA STATUTORY SCHEME DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION WHERE THE STATUTES DISTINGUIGH BETWEEN THE STANDARDS INVOVLED IN A CHANGE IN CUSTODY PURSUANT TO A CHINS/ DEPENDENCY FINDING AND THE STANDARDS REQUIRED IN TERMINATION OF PARENTAL RIGHTS CASES.

The statutes and case law in Alabama have established differing standards, burdens, and requirements for these custody cases because the rulings of the courts have differing effects on the parties. The Appellants' reliance on Ex Parte Terry, 494 So. 2d 628 (Ala. 1986) is misplaced since the instant case was not a termination of parental rights case, and to characterize it as such is erroneous espe-

cially in light of the fact that the Trial Court ordered the child and the parents to continue counseling with the hope of reconciliation at a later date.

Differing standards, burdens, and tests for various types of cases are required to meet each particular factual situation and type of petition that is brought before the Family Court; therefore, such differences in the Alabama law do not violate the equal protection safeguards.

IV. SECTION 12-15-71 OF THE CODE OF ALABAMA (1975) IS NOT UNCONSTITUTIONAL FOR THE REASONS OFFERED BY THE APPELLANTS.

The parents present the distinction between the least restrictive alternative and the most restrictive alternative as dispositional options or standards that the Family Court should use in CHINS and dependency cases involving custody changes. This distinction, standard, or

test that is advocated by the Appellants is not founded in the case law or in any provision of the Alabama statutes and is an incorrect analysis of the manner in which these statutes are applied to particular cases by the Family Court. The test in custody cases is, as always, to determine what alternative is in the child's best interest, and the Family Court is not required to use the least restrictive alternative vs. the most restrictive alternative procedure in reaching a decision on child custody especially when no termination of parental rights is involved.

This section of Alabama Juvenile Proceedings statutes is not unconstitutional.

V. THE TRIAL COURT'S ORDER DID NOT VIOLATE APPELLANTS' DUE PROCESS RIGHTS.

As the lengthy factual summary indicates, the Trial Court had a tremendous

amount of evidence to evaluate in arriving at a decision on the custody of this child. The parents continually stress their rights to custody and control of their child; however, they ignore the balancing aspect of the the Trial Court's decision-making in protecting the parents' rights versus the rights of a child with obvious problems at home and ample evidence of emotional and physical abuse. The Family Court is not required to make specific factual determinations as to the disposition of CHINS and dependency custody cases. The Alabama statutes offered clear guidance for the Trial Court as to its options in this case which was initiated by the parents pursuant to the provisions in Title 12 of the Code of Alabama (1975). These parents now seek to have the same statutes declared unconstitutional. Appellees contend that the statutes are constitutional and were properly applied

in this case.

VI. THE PARENTS WERE NOT DENIED PROCEDURAL DUE PROCESS THROUGH THE HOLDING OF DEPENDENCY BECAUSE THE DEPENDENCY WAS ALLEGED AND THE PARENTS HAD ADEQUATE NOTICE OF THE ALLEGATION.

This portion of the parents' argument is factually and legally incorrect. The circumstances surrounding the motion to intervene and the subsequent petition for custody with its dependency allegation are brought out in the Statement of the Case above. The parents had notice of the issues to be tried, and in fact they had the Christmas holiday break between the filing of the Baileys' custody petition in the initial hearings and the trial of the case during which time they had ample opportunity to prepare their case for trial.

CONCLUSION

The constitutional questions presented here were not raised at trial, the Alabama statutes are clear and concise on these issues, and the lower courts properly applied these statutes; therefore, the Appellees request that the Supreme Court deny the review of this appeal.

Respectfully submitted,

Annetta Z. Arnold
(Counsel of Record)

H. Evans Whaley
Vincent, Hasty, Arnold,
Whaley, P.C.
90 Bagby Drive
Suite 200
Birmingham, AL 35209
(205) 942-7649

J. Wynell Brooks
Public Defender
120 Second Court North
Birmingham, Alabama 35211

CERTIFICATE OF SERVICE

I certify that I have served three copies of the foregoing Brief In Opposition on all aprties requiring to have been served, by mailing the same to the Honorable L. Drew Redden, Redden, Mills & Clark, 940 First Alabama Bank Building, Birmingham, Alabama 35203, properly addressed and with sufficient first class postage prepaid, this the 7th day of August 1987.

Annetta Z. Arnold
Of Counsel for Appellees